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# Public Prosecutor v Barry Jipmon & Ors

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HIGH COURT (KOTA KINABALU) — CRIMINAL CASE NO BKI-46B-1/10 OF 2020
CHRISTOPHER CHIN J
26 OCTOBER 2023

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*Criminal Law — Murder — Prima facie case not established — Prisoner died following assault on him by five prison wardens — Wardens did not know prisoner was suffering from viral infection of brain — Medical evidence revealed death was not caused by injuries sustained from assault but by worsening of brain condition caused by the assault — Whether wardens only intended to discipline prisoner and not to kill him or cause injuries likely to cause death — Whether prosecution had not proven prima facie case of murder but only of causing death by negligence under s 304A of Penal Code*

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Ten prison wardens of the grossly-overcrowded Kepayan Central Prison in Kota Kinabalu, Sabah, were jointly charged in the instant case with committing the murder of a prisoner ('the deceased') at the prison between the second and fourth day of October 2019. Unknown to the ten accused, the deceased was suffering at the time from a viral infection of his brain (Kem Paradise). This was diagnosed by a doctor ('PW3') at the Kota Belud Hospital ('KBH') where the deceased was taken on 30 September 2019 after he was found to be behaving aggressively. Because of the lack of facilities at KBH, PW3 sent the deceased to a bigger hospital ('QE1') for further treatment. However, after only a day's admission at QE1, the deceased was discharged and taken to Kepayan Prison where, within hours after his arrival, he began to act aggressively again. The deceased was put into a straitjacket and isolated and eye-witnesses testified that they saw five prison wardens assaulting the deceased, presumably to discipline him. The deceased lost consciousness following the assault. He was rushed to QE1 but was pronounced dead on arrival. The eye-witnesses identified the five wardens who had assaulted the deceased as Farizan bin Mokri, Mohd Saiful bin Saidin, Amran Yasik, Tomy bin Momoh and Muhammad Fazi bin Lakui ('the five assailants').

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**Held**, acquitting and discharging all ten accused of the charge of murder, convicting the five assailants on a new charge of causing death by negligence under s 304A of the Penal Code and ordering them to pay a fine of RM1,500 each in default one month's jail:

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(1) The death of the deceased was caused by a poor standard operating procedure in the Kepayan Prison in dealing with ill patients exacerbated

by the slip-shod manner, bordering on negligence, in the way the deceased was treated and discharged by the Neurology Ward of QE1 (see para 9).

(2) The court found that a person suffering from Kem Paradise would suffer behavioural changes such as aggression. QE1 had discharged the deceased after a day's admission without any prescription for medication or any report to suggest or alert Kepayan Prison of the ailment the deceased was suffering from. Thus no one at the prison knew about the deceased's condition. Any blow or blows to his head would have caused death. When he became a nuisance at the prison because of his affliction, the wardens assumed he was misbehaving and put him into a straitjacket and placed him in isolation and assaulted him in an attempt to discipline him, not knowing that each blow to the head worsened the deceased's condition and would eventually cause his death (see para 9).

(3) The medical evidence showed that the assault by itself did not cause the deceased's death. Death occurred because the assault aggravated the deceased's pre-existing Kem Paradise condition. Based on that evidence, the prosecution had failed to prove a prima facie case of murder against the accused persons (see paras 26–29).

(4) While it was understandable that prison wardens had to maintain discipline in the hopelessly overcrowded Kepayan Prison, the five assailants went too far. While they had no intention to kill, they had assaulted a person wearing a straitjacket who had no means to ward off the blows or defend himself. Under such circumstances, the assaults were excessive. The five assailants believed they were doing their duty but they were negligent in so doing (see para 34).

(5) Since there was no cogent evidence to link the five other accused jointly charged with the five assailants to the injuries on the deceased, they were acquitted and discharged. As for the five assailants, however, the prosecution had made out a prima facie case against them under s 304A of the Penal Code of causing death by negligence (to which all five pleaded guilty). The maximum punishment for a 304A offence was two years' jail or a fine or both. Since the five assailants had already been in prison for four years pending trial, they had effectively served a prison term that was double the penalty prescribed by law. Taking into account all factors, including that the five assailants had received awards for exemplary service in the discharge of their duties from their employer, the court imposed a fine of RM1,500 fine on each of them in default one month's jail (see paras 37–38, 40 & 42–44).

**[Bahasa Malaysia summary**

Sepuluh warden penjara di Penjara Pusat Kepayan yang sesak di Kota Kinabalu, Sabah, dituduh bersama dalam kes ini kerana membunuh seorang

banduan ('si mati') di dalam penjara tersebut antara hari kedua dan keempat Oktober 2019. Tidak diketahui oleh kesemua tertuduh, si mati mempunyai jangkitan virus di dalam otak (virus meningitis). Penyakit ini dikesan oleh doktor ('PW3') di Hospital Kota Belud ('HKB') di mana si mati telah dihantar pada 30 September 2019 selepas didapati berkelakuan agresif. Oleh kerana kekurangan kemudahan di HKB, PW3 menghantar si mati ke hospital yang lebih besar ('QE1') untuk rawatan lanjut. Walau bagaimanapun, selepas kemasukan di QE1 selama sehari, si mati dibawa ke Penjara Kepayan di mana dalam masa beberapa jam, dia mula bertindak agresif lagi. Si mati dipakaikan jaket ketat dan diasingkan dan saksi mata memberi keterangan bahawa mereka melihat lima warden penjara memukul si mati mungkin untuk mendisiplinkannya. Si mati tidak sedarkan diri berikutan serangan itu. Beliau dikejarkan ke QE1 tetapi disahkan meninggal dunia semasa ketibaannya. Saksi-saksi mata telah mengenal pasti lima orang warden yang telah memukul si mati iaitu Farizan bin Mokri, Mohd Saiful bin Saidin, Amran Yasik, Tomy bin Momoh dan Muhammad Fazi bin Lakui ('lima tertuduh').

**Diputuskan**, melepaskan dan membebaskan kesemua sepuluh tertuduh dari pertududuhan bunuh, mensabitkan lima tertuduh dengan pertuduhan baru iaitu kecuaian menyebabkan kematian dibawah s 304A Kanun Keseksaan dan memerintahkan mereka untuk membayar denda sebanyak RM1,500 seorang jika gagal bayar sebulan penjara:

(1) Kematian si mati disebabkan oleh standard operasi prosedur yang lemah di Penjara Kepayan dalam menangani pesakit yang diburukkan lagi dengan sikap sambalewa dan kecuaian, melihat kepada cara si mati dirawat dan dilepaskan oleh Wad Neurologi QE1 (lihat perenggan 9).

(2) Mahkamah mendapati bahawa orang yang mempunyai virus meningitis akan mengalami perubahan tingkah laku seperti agresif. QE1 telah melepaskan si mati selepas kemasukan selama sehari tanpa sebarang preskripsi untuk ubat-ubatan atau sebarang laporan untuk memberi tahu atau memberi amaran kepada Penjara Kepayan mengenai penyakit si mati. Oleh itu, tiada siapa di penjara yang tahu tentang keadaan si mati. Sebarang pukulan ke kepalanya akan menyebabkan kematian. Apabila dia berkelakuan agresif di penjara kerana penyakitnya, warden-warden menganggap dia berkelakuan jahat dan memakaikan jaket ketat dan mengasingkannya serta memukulnya bertujuan untuk mendisiplinkan simati tanpa mengetahui bahawa setiap pukulan ke kepala memburukkan keadaan si mati dan akhirnya akan menyebabkan kematiannya (lihat perenggan 9).

(3) Keterangan perubatan menunjukkan bahawa pukulan itu dengan sendirinya tidak menyebabkan kematian si mati. Kematian berlaku kerana pukulan itu memburukkan lagi keadaan virus meningitis yang sedia ada menjangkiti si mati. Berdasarkan keterangan itu, pihak

pendakwaan gagal membuktikan kes prima facie kes bunuh terhadap tertuduh-tertuduh (lihat perenggan 26–29).

(4) Walaupun difahami warden-warden penjara terpaksa memastikan disiplin di Penjara Kepayan yang sesak itu dipatuhi, namun kelima-lima tertuduh itu telah bertindak secara keterlaluan. Walaupun mereka tidak berniat untuk membunuh, mereka telah memukul seseorang yang memakai jaket ketat yang tidak berupaya untuk mengelak pukulan atau mempertahankan dirinya. Di dalam keadaan sedemikian, serangan itu adalah keterlaluan. Lima tertuduh itu percaya mereka menjalankan tugas mereka namun mereka cuai dalam menjalankan tugas (lihat perenggan 34).

(5) Memandangkan tiada keterangan kukuh untuk mengaitkan lima tertuduh lain yang dituduh secara bersama dengan lima tertuduh itu sehingga menyebabkan kecederaan ke atas si mati, mereka dibebaskan dan dilepaskan. Walaubagaimanapun, bagi lima tertuduh pula, pihak pendakwaan berjaya membuktikan kes prima facie terhadap mereka di bawa s 304A Kanun Keseksaan iaitu kecuaian yang menyebabkan kematian (yang mana kelima mereka mengaku bersalah). Hukuman maksimum bagi kesalahan 304A ialah penjara dua tahun atau denda atau kedua-duanya sekali. Memandangkan lima tertuduh itu telah dipenjarakan selama empat tahun sementara menunggu perbicaraan, mereka telah menjalani hukuman penjara yang dua kali ganda daripada hukuman yang ditetapkan oleh undang-undang. Mengambil kira semua faktor, termasuk lima tertuduh itu telah menerima anugerah untuk perkhidmatan teladan semasa menjalankan tugas daripada majikan mereka, mahkamah mengenakan denda sebanyak RM1,500 ke atas setiap tertuduh jika gagal membayar denda, penjara selama sebulan (lihat perenggan 37–38, 40 & 42–44).]

**Legislation referred to**

Criminal Procedure Code s 180
Penal Code ss 34, 300, 300(a), (b), (c), (d), 302, 304A

*Mohd Taufik Mohd (with Rustam Sanip and Bryan Francis) (Attorney General's Chambers) for the prosecution.*
*PJ Perira (PJ Perira & Dasan) for the accused.*

**Christopher Chin J:**

**[1]** This decision takes into account three indisputable facts.

**[2]** *Firstly*, a prisoner has died and his death was not due entirely to natural causes. The post mortem report certified the cause of death as:

> Sequalae [consequence] of multiple blunt force injuries in a man with encephalitis [inflammation of the active tissues of the brain caused by an infection of an autoimmune response].

**[3]** *Secondly*, that Kepayan Prison which is built and designed for 1,500 inmates currently is home to in excess of 3,000 inmates (*Star News*, 28 October 2020) is thus woefully overcrowded and as internationally reported when several tourists in 2015 decided to strip while on the summit of the sacred Mount Kinabalu and were subsequently arrested and remanded there:

> ... is 'horrendously' overcrowded with a permanent stench of urine, a source told UK paper Daily Mail, as reports on the arrest of a British tourist who allegedly stripped naked on Mount Kinabalu continue to make headlines there.
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> According to the report on Mail Online, the source alleged that the women's wing of the 'hellhole' prison in Sabah was so overcrowded that Eleanor Hawkins, former head girl of a £12,000-a-year (S$25,000) private school, would have to take turns sleeping because of a shortage of mattresses should she be found guilty of public indecency.
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> 'Last time I went there, the smell was horrible. None of the women had showered for days and you can smell urine everywhere. It's just terrible,' the source was quoted saying. (Source 'M News; 12.06.2015).

**[4]** *Thirdly*, the nature of prison life in Kepayan Central Prison. The inmates of Kepayan prison are not model law-abiding citizens. They are in prison for the very fact they have been found to have a disregard of the law in some respect. These circumstances require the hopelessly out-numbered prison wardens to be ever vigilant of any mis-conduct by any prisoner. Any prisoner stepping out of line will be dealt with severely, and not surprisingly physically, so that the wardens are always kept on top of any situation. This court does not and will not condone any form of unwarranted or unlawful violence committed on a prisoner but also cannot at the same time be blind to the circumstances existing in our over-crowded prisons.

## THE CHARGE

**[5]** The ten accused were charged under s 302 of the Penal Code read with s 34 of the Penal Code, as follows:

> That you between 2nd to 4th day of October 2019 at the hours of 1610 p.m., in cell No. 11 at Blok Gemilang, Penjara Pusat Kota Kinabalu, Jalan Kepayan, in the District of Kota Kinabalu, in the state of Sabah, did commit murder by causing death of one Shainal bin Mukhtar, a male, (NRIC No: 830712-12-5489) and that you thereby committed an offence punishable under Section 302 of the Penal Code [Act 574] read with Section 34 of the Act 574 of the Laws of Malaysia

A CLOSE OF PROSECUTION'S CASE

**[6]** For completeness one is reminded of the court's role at the end of the prosecution's case as encapsulated in s 180 of the Criminal Procedure Code:

B (1) When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a prima facie case against the accused.

(2) If the Court finds that the prosecution has not made out a prima facie case against the accused, the Court shall record an order of acquittal.

C (3) If the Court finds that a prima facie case has been made out against the accused on the offence charged the Court shall call upon the accused to enter on his defence.

(4) For the purpose of this section, a prima facie case is made out against the D accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.

E INGREDIENTS FOR THE OFFENCE UNDER S 302 OF THE PENAL CODE

**[7]** The ingredients of the charge that must be proven by the prosecution beyond reasonable doubt so as to secure a conviction unless rebutted by the defence is as follows:

F (a) that the victim, Shainal bin Mukhtar was the deceased;

(b) that Shainal bin Mukhtar died due to the injury(s) found on him;

(c) that the injury(s) found on Shainal bin Mukhtar was inflicted by the G accused persons in the circumstances listed in s 300(a) to (d) of the Penal Code; and

(d) the crime was committed by the accused persons in furtherance of common intention.

H BRIEF FACTS AND SEQUENCE OF EVENTS

**[8]** The following is the largely undisputed sequence of events and dates from the time the victim left Kem paradise in Kota Belud top his demise:

I (a) on 30 September 2019, at approximately 6:27pm, the victim was brought to Hospital Kota Belud from Kem Paradise, Kota Belud;

(b) at Hospital Kota Belud, Dr Rahimah bt Rasali (PW3) attended to the victim. PW3 tranquilised the victim as he was behaving aggressively. In a nutshell, PW3 diagnosed the victim as having a viral infection in his

brain (*jangkitan kuman pada selaput otak*). PW3 prepared a medical report and her medical report (exh P10) was tendered as evidence;

(c) due to the lack of medical facilities, apparatus and equipment to properly diagnose and treat the victim at Hospital Kota Belud, PW3 referred the victim to Queen Elizabeth Hospital I, Kota Kinabalu (QEH 1) for further treatment. At about 10:30pm, the victim left Hospital Kota Belud in an ambulance and arrived the Emergency Department of QEH 1 on 1 October 2019 at 12:01am;

(d) the Emergency Department of QEH I then referred the victim to the Neuroward of QEH I where the victim was subsequently warded and discharged on 2 October 2019 (see exhibit P24);

(e) on 2 October 2019, at approximately 10:45am upon being given a discharge by the Neuroward of QEH I, the victim was escorted to Kepayan Prison (Penjara Kepayan) by Sjn. Jellysius bin Soimpon (PW5) and Sjn Abdul Halil bin Mandang (PW12). They arrived at Kepayan Prison at approximately 11:15am;

(f) on 2 October 2019, between 2pm – 9pm the victim started to act aggressively and at about approximately 7:20pm the KPYB (*Ketua Pegawai Yang Bertugas*), that is Supt. Richard Robin @ Richard Ibin gave instructions to use a straight jacket (baju pasong) on the victim. This fact was corroborated by Sjn Mejar (SM) Azman bin Sulaiman (PW14) and KIP Danny Roland (PW17);

(g) PW17 witnessed the fourth accused allegedly causing hurt to the victim at his stomach. PW17 also witnessed the tenth accused allegedly using his bare hands to punch the victim's body;

(h) the prosecution in establishing its case called Arsit bin Indanan (PW 25) a prisoner incarcerated in a cell directly opposite the victim's cell. PW25 allegedly witnessed third, fourth, fifth and eighth accused assaulting the victim;

(i) on the 4 October 2019 at 3pm according to PW10, the victim was brought unconsciousness by the prisoner officer to Klinik Penjara Pusat Kepayan where CPR was conducted immediately to the victim; and

(j) at 4pm PW1 testified that he together with Warden Nizam brought the victim to Emergency Department, Queen Elizabeth Hospital 1 for further treatment since the victim was found unconsciousness. At 4.10pm, Doktor Rubayini Periyanan told PW1 that the victim was pronounced dead.

A SYNOPSIS OF FINDINGS IN THIS CASE

**[9]** As the prosecution's case unfolded my suspicion became increasingly proven that the death of the victim was caused by a poor standard operating procedure in the Prisons department in dealing with ill patients, exacerbated by the slip-shod manner bordering on negligence, in the way victim was treated and discharged by the Neurology Ward of Queen Elizabeth 1 Hospital in Kota Kinabalu. I find:

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(a) while the victim was in Kem Paradise at Koat Belud which is a prison facility for rehabilitation of prisoners, the victim suffered bouts of aggression, fainting and other behavioural changes. He was thus brought to Kota Belud District Hospital. On the way to this hospital, he suffered convulsions and was foaming in the mouth;

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(b) that the victim was suffering from Kem Paradise as diagnosed by PW3 Dr Rahimah bt Rasali in the Kota Belud Hospital on the 30 September 2019, four days before his demise. This diagnosis was not confirmed by PW27 Dr Ananda a/l Arumugam of the Hospital QE1 '(QE1'). However, this diagnosis was finally confirmed by PW28 Dr Murali a/l Narayansamy in his post mortem report upon dissection of the victim's brain;

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(c) that a person inflicted with Kem Paradise would suffer character behavioural changes such as aggression;

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(d) when QE1 discharged the victim one day after admission it was without any prescription for any medication or of any report to suggest or alert Kepayan Prison of the ailment of the victim or of his likely behavioural changes;

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(e) owing to the manner in which the victim was discharged from QE1, no one in Kepayan Prison knew that the victim had Kem Paradise;

(f) owing to the nature of Kem Paradise affecting the brain tissue, a subsequent blow or blows to the head of such person has an increased propensity to cause death;

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(g) when the victim started to cause a nuisance owing solely to his mental affliction, the prison wardens assumed that the victim was misbehaving and, critically, they were not aware that such altered character of the victim was due to his altered state of mind brought about by his illness;

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(h) such altered character was evidenced by the fact that the victim was put into a straitjacket (*baju pasong*) as well as being placed 'Blok Muhibah' an isolation block in Kepayan Prison;

(i) the victim was assaulted by prison wardens to discipline him owing to what they perceived as the victim's aggression and misbehaviour;

(j) such assault included blows to the head, likely knocking the victim's head against the cell wall;

(k) owing to the blows to the head received by the victim in an act of disciplinary action by the wardens, the victims brain condition was severely aggravated resulting in his death; and

(l) this is confirmed by the cause of death in the post mortem report of PW28 — Dr Murali.

*First ingredient — That the victim, Shainal bin Mukhtar was the deceased*

**[10]** The defence of the ten accused do not dispute that the deceased in this case was the victim, Shainal bin Mukhtar.

*Second ingredient — That Shainal bin Mukhtar died due to the injury(s) found on Shainal bin Mukhtar was inflicted by the Accused Persons in the circumstances listed in s 300(a) to (d) of the Penal Code*

**[11]** What is in contention is whether his death was caused by the injury found on him.

**[12]** At the outset, this court finds unaccustomed comfort in accepting the evidence of PW3 Dr Rahimah bt Rasali, the young 25 years old medical officer at the Kota Belud Hospital's Emergency ward. Her evidence was clear, unhesitant, and displayed a clear meticulous manner of the discharge of her medical duties. She administered tranquiliser to the aggressive victim to calm him down, took blood and found him to suffer from 'kuman pada selaput otak'. Paragraph 4 of WSPW3. Her observations and her report were thorough and I found that she is a pleasant credit to her profession and to her alma mater, University Malaysia Sabah. Her report n P10 observed:

> In red zone, patient still aggressive, not cooperative, shouting, 'sudahlah sudah lah' and tried to loose himself from the chain, He was then put on 4 point restraint ... persistent aggressiveness and restless behaviour.
>
> Had history of vomiting the previous 3 days.

**[13]** She suspected the victim to be suffering from Kem Paradise but as the Kota Belud District Hospital lack testing facilities, she had the victim referred to the neurological clinic of the Central Queen Elizabeth 1 Hospital for treatment. Her suspicions as to the ailment plaguing the victim was not confirmed by the neurology clinic of QE1 but ultimately confirmed by PW28 Dr Murali a/l Narayanasamy the Forensic Pathologist in his post mortem report:

> Sequalae (consequence) of multiple blunt force injuries in a man *with encephalitis* (Emphasis added.)

**[14]** PW8 also opined that, 'Brain histology shows evidence of viral meningoencephalitis' or meningitis.

**[15]** It is clear from the testimony of PW28, the Forensic Pathologist who was calm and careful in all his answers in court and was a reliable witness that:

> Q: In this case, having dissected and examine the brain to arrive at your conclusion of encephalitis, is it possible to tell roughly how long the victim had this condition prior to his death based on your observation? (line 14148 et seq)
>
> A: In referencing page 7 of my report, under S.7(a), I mentioned sections show focal perivascular and leptomeningeal infiltration. Perivascular infiltration may suggest that this infection has been going on for approximately 2–3 weeks.

**[16]** PW27, Dr Ananda a/l Arumugam the Consultant Neurosurgeon at QE1 testified that the another blow on the victims' head with his latent brain issues would cause death at line 12571 (et seq):

> Q: You mentioned 'when this patient sustains another injury in his head within 1 to 2 weeks in a short period, this can cause sudden brain swell, can lead to seizure and death', can you explain that?
>
> A: After the patient sustained concussion, this patient can be treated medically and this patient will be given head injury advice explaining do not involve in any sports contact or riding motorbike or vehicle. So, if this patient within a short period involved another head injury, the patient will have sudden brain swelling because of the first injury and can leads to death.

**[17]** PW28 opined that the head injuries alone were insufficient to cause death. Meaning that death occurred as a result of the *combination* of the assault as well as the victim's inflamed brain tissue. At line 13990:

> Q: If the deceased had another seizure after his discharge from Hospital Queen Elizabeth 1 on 02.10.2019 and had hit his head on the floor or the wall when fitting, do you agree that could have caused sudden brain swell which caused or contributed to his death?13993
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> A: Based on my postmortem report on page 4, there were no extradural, intra cerebral or intraventricular haemorrhages seen. So, if it was alleged that the victim had a fit or hit his head on the floor, there were also no fractures seen. *In my opinion, the head injuries alone are insufficient to have caused his death at that moment in time.* (Emphasis added.)

**[18]** Further evidence of the victim's meningitis in the post mortem report at line 14000 et seq by PW28:

> Q: In the second paragraph in page 4 of your report, you have also noted that 'there were bite marks over the right and left lateral margins of the tongue with associated haematomas'.

Do you agree that the said biting marks could have resulted from the deceased biting on his tongue during his episode of fitting?

A: Yes, I agree. It is possible.

**[19]** Then confirmed by PW28 that Encephalitis was a cause of death at line 14339:

Q: I put it to you that in your postmortem report at the cause of death, 'Sequale ...encephalitis'. Encephalitis was written in the cause of death because it has contributed to the cause of death, agree? Even though it may be 1%.

A: Yes, I would agree.

**[20]** Tragically, a contributory cause of death was the manner which the victim was discharged the day following his admission. P24 the Discharge Note from QE1 simply stated:

Admitted 1.10 discharge 2.10

Mild traumatic brain injury and (L) tendorial subdural haemorrhage — convulsive

1) Allow discharge

2) TCA [to come again] NSC [neuro surgical clinic] 1/12

3) Encourage fluid intake — mild acute kidney injury

(Signed) Dr Mohammad Aiman Bin Mohd Mohd Pegawai Perubatan UD44 Hospital Q E.

**[21]** There is nothing in the P24 to caution Kepayan Prison to avoid blows to the victim's head. Critically, there is nothing to alert Kepayan Prison that the victim would suffer to behavioural changes such as aggression. Unfortunately, the victim suffered episodes of aggression and altered character owing to the illness and condition of his brain. The prison wardens, including the ten Accused were completely ignorant of the victim's illness, then sought to discipline him in the manner common in the prisons, literally, to beat him to his senses. Instead and unwittingly, the victim was a proverbial thin egg shell and the beating aggravated his brain condition resulting in death.

**[22]** It must be stressed that the victim had no prior record of being aggressive. He was a model prisoner and was intelligent enough to be recruited to work in the records section of the Prison, where he excelled to the extent that he was sent to Kem Paradise in Kota Belud, for rehabilitation, prior to his release. Exhibit P6 — Memohon Laporan Prestasi Banduan penama Shainal bin Mukhtar which was dated 8 November 2019 gave a glowing report of the victim:

Interpretasi

Personaliti normal — keplian kehendak kemahuan dan motif yang tinggi untuk mengenal diri, insaf dan bertaubat, pencapaian, pertumbuhan diri, mencapai kepuasan serta mencari nilai yang suci murni usaha kearah perubahan menjadi manusia yang lebih baik.

**[23]** On the 2 October 2019, two days before he died, the victim was noted by PW26 (the investigation officer) as disturbing other inmates, making noise, did not give full cooperation resulting in the decision to have the victim physically restrained by causing him to wear a strait jacket and placed in the isolation cell.

*Conclusion on the second ingredient — that Shainal bin Mukhtar died due to the injury(ies) found on him*

**[24]** Based on the expert opinion of PW28, the forensic pathologist and before that the clear and thorough observations of the young medical officer at Kota Belud District Hospital, PW3 and supported in part by the consultant neurosurgeon at QE1, PW27, the victim, Shainal bin Mukhtar was suffering from Kem Paradise. This condition results in two main symptoms, firstly, the swelling of his brain tissue and, secondly, that he would suffer behavioural changes.

**[25]** The prison wardens made up of the ten accused were not aware of the illness of the victim and sought to discipline the victim after interpreting the victim's behavioural changes as insubordination. The victim was beaten and at some stage the victim took blows to his head.

**[26]** The blows to the head by themselves were not fatal but because of the victim's re-existing full-blown Kem Paradise it aggravated his brain condition resulting to the victim's tragic death.

**[27]** The blows alone suffered by the victim were insufficient to cause death. Death occurred as a sequela or consequence blunt force trauma on the victim who was suffering from encephalitis due to meningitis.

**[28]** Principally based on the testimony of the witnesses who were doctors I find that the second ingredient, that the victim died as a result of the injuries inflicted on him by the ten accused was not proven beyond reasonable doubt. That being the case I need not consider the other ingredients of a charge of a s 302 murder in this case.

**[29]** There is hence no prima facie case of murder proven against the ten accused. The manner the victim was discharged from QE1 and procedures in medical facility in the prison system was such that there is no process or system

to alert all the prison wardens that because of his illness the victim was susceptible to behavioural changes and that although externally or physically, the victim looked normal, he was in fact very ill.

*An inmate has died*

**[30]** However, this court cannot be blind to the fact that the victim has died and the blows he received, which were intended to discipline the victim eventually led to his death as discussed above.

*PW17 Danny Roland (Prison Officer)*

**[31]** PW17 testified that when he was standing outside Cell No 11, he saw the fourth accused punched the victim's torso several times. PW17 also testified that, when the tenth accused arrived at Cell No 11 and he also immediately punched the victim on his body for several times. Of all the prosecution witnesses from the Prisons I found PW17 to be the most reliable. I recorded in my notes that he, 'Answers spontaneously. Seems honest. Deliberate, believable'. Those he identified are:

(a) fourth accused — Mohd Saiful bin Saidin; and

(b) tenth accused — Muhammad Fazi bin Lakui.

*PW25 Arsit bin Indanan (prisoner)*

**[32]** PW25 was locked in a cell directly opposite cell No 11 where the victim was held. PW25 is himself charged with the murder, the murder of a Grab driver. Just before he gave evidence before me I was alerted and cautioned by the court staff of his erratic and unstable behaviour during his murder trial in a neighbouring courtroom. I recorded that he was somewhat hesitant and paused before answering some questions. He clearly understood and comprehended the proceedings and I found his deliberate answers to be consistent even during cross-examination. Despite his somewhat sinister demeanour I believe he was speaking the truth before me.

**[33]** While in the isolation cell he testified that he witnessed some of the ten accused assault the victim. His identification was consistent with the persons he identified at an identification period. Such identification parade was not admitted in evidence as it contravenes the mandated guidelines for such procedures but I am prepared to accept the fact of PW25's identification therein purely for its corroborative value to his testimony before me. He saw the following assault the victim:

(a) third accused — Farizan bin Mokri;

(b) fourth accused — Mohd Saiful bin Saidin;

(c) fifth accused — Amran Yasik; and

(d) eigth accused — Tomy bin Momoh.

**[34]** While I can understand the need of prison wardens to maintain discipline in the hopelessly overcrowded Kepayan prison, these five accused identified by PW17 and PW25 went too far. While they had no intention to kill, they were assaulting a person wearing a straitjacket with no means to ward off the blows or defend himself. The assaults under these circumstances I find to be excessive. These accused believed they were doing their duty but they were negligent in so doing. Their negligent sense of balance and use of force resulted in the eventual death of the victim although this was never their intention. They were unaware of the pre-existing or latent illness of the victim's brain where a further blow to his head would be fatal to the victim, which in this case it tragically was.

*Kem Paradise, Kota Belud*

**[35]** While the victim was at Kem Paradise it is not disputed that he became aggressive and had convulsions. These were observed and recorded by PW3, the meticulous young medical officer at Kota Belud District Hospital in her notes which were tendered in court. It is likely, for the same purpose of discipline, the victim may already have been beaten at Kem Paradise by persons unknown. PW27, the Neuro Surgeon at QE1 testified at line 13019:

> He [the victim] had suffered multiple trauma beforehand, prior to admission.

These observed multiple trauma must be considered in the light of the fact that it was medically observed barely three days prior to the victim's sad demise. These clear observations by an impartial medical practitioner three days before death creates doubts as to whether the injury inflicted by any of the ten accused was alone the cause of death. Clearly the victim had suffered trauma *prior* to being re-incarcerated at Kepayan prison.

*Section 304A*

**[36]** For the reasons discussed above and having considered all the evidence adduced before me, I find that the prosecution has failed to prove the charge of murder beyond reasonable doubt under s 300 of the Penal Code against all the Ten Accused and they are all accordingly acquitted of such charge.

**[37]** However, I find that the prosecution has established a prima case under s 304A of the Penal Code against the following five accused and I accordingly order that a fresh charge be read to them and their plea to be taken. They are to enter upon their defence upon such reduced charge unless they choose to plead guilty. Section 304A of the Penal Code provides:

304A Causing death by negligence

Whoever causes the death of any person, by doing any rash or negligence act not amounting to culpable homicide, shall be punished with imprisonment for a term which may extend to two years or with fine or with both.

**[38]** The five to be subject to a reduced charge are:

(a) Farizan bin Mokri — third accused;

(b) Mohd Saiful bin Saidin — fourth accused;

(c) Amran Yasik — fifth accused;

(d) Tomy bin Momoh — eighth accused; and

(e) Muhammad Fazi bin Lakui — tenth accused.

**[39]** Before coming to my decision on s 304A above I had considered whether my finding of facts in this case would merit a reduced charged under ss 304 (a) or (b) of the Penal Code which provides as follows:

304 Whoever commits culpable homicide not amounting to murder shall be punished —

(a) with imprisonment for a term which may extend to thirty years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death; or

(b) with imprisonment for a term which may extend to ten years or with fine or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

The key ingredient in (a) above is that the act was done — 'with the intention to cause death' and in (b) — 'with knowledge that it is likely to cause death'. I find that the acts of the Accused upon the victim were sought only to discipline an aggressive and misbehaving prisoner, the victim, had no intention of causing death. For instance, the beating of the victim with the cane cannot be deemed or considered to be likely to cause death as it represents corporal punishment in Malaysia for numerous offences and is intended only to punish and not to maim or kill. For the above reasons I find that both sub-ss 304(a) and (b) do not fall within the facts of this case.

**[40]** However, the following accused are acquitted and are free to go as considering the pressing circumstances of the dangerously overcrowded Kepayan Prison I am not prepared to consider against them the issue of their common intention under s 34 of the Penal Code despite them being observed to present with the victim. I find that there is no cogent evidence at all linking

A them to the injuries on the victim, save that they were all working at Kepayan Prison at the relevant time.

(a) Barry Jipmon — first accused;

(b) Mohd Dzulfikri bin Mohd Safri — second accused;

B

(c) Ab Mutalib @ Talib Bin Ab Rasul — sixth accused;

(d) Zerry bin Maidin — seventh accused; and

(e) Shahryll Nazry bin Wan Sofian — ninth accused.

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SENTENCE

**[41]** As the five accused have pleaded guilty after the amended reduced charge was read, translated and explained to them. I accordingly record their D conviction under s 304A of the Penal Code as charged.

**[42]** I take into account that the maximum penalty of imprisonment under s 304A of the Penal Code is two years with a fine. All the accused have effectively been in prison for four years which is doubled the penalty stipulated E by law. In fact, it is this very extended period of remand that cause me to force the early hearing of this trial even though my time in the judiciary is limited.

**[43]** Under this circumstances, and taking into account all the usual concerns in relation to sentencing such as public interest, the severity of the F offence and generally the circumstances of this case, and taking in particular the fact that these five accuseds have been in jail for four years already, although they are presumed to be innocent until otherwise ordered by this court, I find that they have been punished by imprisonment already more than that G prescribed by law.

**[44]** I agree with the prosecution that in this case, a bond of good behaviour is not appropriate especially since the offence has resulted in a death. In relation to a fine which I am entitle to impose, I again take into account the punishment H that they have already undergone prior to this trial. However, the five accused are reminded that while they do their jobs, they have to be mindful of their duty to the prisoners who are human beings under their watch. I also take into consideration that these five accused had, without exception all received, from their employer, award for exemplary service in discharging their duties. I Accordingly, I impose a fine of RM1,500 to each of the five accused persons in default one-month imprisonment.

**[45]** I conclude by hoping that this case will result in some change in the standard operating procedure both in the General Hospital as well as in the Prisons so that prison wardens can be alerted as to the expected symptoms of any prisoner who is found to be ill

**[46]** I order the exhibits to be destroyed after the appeal process has been exhausted.

*All ten accused acquitted and discharged of the murder charge, five assailants convicted on a new charge of causing death by negligence under s 304A of the Penal Code with a fine of RM1,500 each in default one month's jail.*

Reported by Ashok Kumar